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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 269

HUMBLE OIL & REFINING COMPANY,
A CORPORATION,
Petitioner,

vs.

MABEL W. MARTIN, ANNIE M. KELLY, SUE KELLY MEE, W. J. VOLLOR, LANDMAN-TELLER, JAMES P. BIEDENHARN, L. C. GWIN and R. D. KUEHNLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. _____

HUMBLE OIL & REFINING COMPANY,
A CORPORATION,
Petitioner,

vs.

MABEL W. MARTIN, ANNIE M. KELLY, SUE KELLY MEE, W. J. VOLLOR, LANDMAN TELLER, JAMES P. BIEDENHARN, L. C. GWIN and R. D. KUEHNLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Humble Oil & Refining Company, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decisions of the United States Court of Appeals for the Fifth Circuit rendered on December 29, 1961, on direct appeal and on April 27, 1962, on petition for rehearing, which, being a divided court in each instance, affirmed a judgment of the United States District Court for the South-

ern District of Mississippi granting Respondents, appellees in said courts, relief sought on questions of jurisdiction and right to recovery.

I.

JURISDICTION.

Jurisdiction to review this case on petition for writ of certiorari is conferred upon this Court by 28 U.S.C., Section 1254(1).

The opinion of the United States Court of Appeals for the Fifth Circuit on the appeal proper was filed on December 29, 1961, and the opinion on petition for rehearing was filed on April 27, 1962. Application to said Court of Appeals to stay the mandate pending the filing of this petition for writ of certiorari has been overruled and denied but no action has been taken by the District Court; and if there is attempt at action in the District Court with no relief granted there, Petitioner will apply to this Court thereasto.

II.

OPINIONS BELOW.

The opinion of the District Court (R. 426-435) is reported in 199 F. Supp. 648, with judgment thereon printed in the record (R. 446-49). An additional order of the District Court was entered on September 7, 1960, granting appeal under authority of 28 U.S.C., Section 1292(b) (R. 452-54).

The major opinion of said Court of Appeals of Circuit Judges Cameron and Wisdom, with per curiam dissent of District Judge Thomas, appears in 298 F.2d 163 and is also printed in the record (R. 471-483); and the majority opin-

ion of said Court on petition for rehearing and the dissenting opinion of District Judge Thomas appears in 301 F.2d 313 and is also printed in the record (R. 530-31).

The Supreme Court of Mississippi opinion of Judge Holmes appears in 90 So.2d 635 and is also printed in the record (R. 170-187), and the Supreme Court of Mississippi opinion of Judge Holmes on suggestion of errors, comparable to petition or rehearing, appears in 92 So.2d 244 and is also printed in the record (R. 188-89).

III.

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Whether 28 U.S.C., Section 1332(a)(1), when applied to the facts of this case, vests jurisdiction in the United States District Court for the Southern District of Mississippi since some of plaintiffs, Respondents here, and indispensable and necessary parties defendant, including trustees under last will and testament of deceased party, are Mississippi residents, there being involved Mississippi property with claims of right thereto by both Mississippi plaintiffs and indispensable Mississippi parties claiming adverse to Mississippi plaintiffs.

2. Not only whether under the laws of the State of Mississippi and opinion of the Supreme Court of Mississippi relating to property rights of parties hereto, the trustees under the last will and testament of Mrs. Anna F. C. Martin, deceased, are indispensable parties, but also whether said trustees had right to execute oil, gas and mineral lease as was done to bind the ultimate remaindermen because the power of trustees was fixed in last will and testament of Anna F. C. Martin as interpreted by the

Supreme Court of Mississippi in case of *Martin* v. *Eslick*, 90 So.2d 635 and 92 So.2d 244, to "hold, own and manage" the property which carried with it the right to execute oil, gas and mineral lease, and which lease is binding on all parties.

3. Whether the Circuit Court of Appeals violated the general rules of construction as to contracts to involve private and public interests and thereby create a novel and important question of peculiar gravity, and in conflict with applicable local decisions, causing a different standard of proof from that heretofore prevailing.

4. Whether the opinion of the Circuit Court of Appeals is in conflict with other like courts in other circuits and with the opinions of the Supreme Court of Mississippi relating to the rights of the parties in this very case, and contrary to opinions of the Supreme Court of the United States, including that of *Thompkins* v. *Erie R. Co.*, 304 U.S. 64, 58 S. Ct. 817, 92 L. Ed. 1188.

5. Whether the Circuit Court of Appeals has through opinion rendered violated the 5th and 14th Amendments to the Constitution of the United States, depriving Petitioner of due process of law by making a strained and uncommon construction of oil, gas and mineral lease contract and of last will and testament of Mrs. Anna F. C. Martin, deceased, and the rules of law applicable thereto.

IV.

STATEMENT OF CASE.

Mabel W. Martin, widow of Eugene Martin, deceased, and her grantees, Respondents hereto, instituted this action against Petitioner to upset existing oil, gas and mineral lease executed by J. Gaillard Martin and Francis C. Martin, sole surviving trustees of Mrs. Anna F. C. Martin,

deceased, dated April 21, 1945, and for accounting and for declaratory judgment under Federal Declaratory Judgment Act (R. 2-9). Of the eight plaintiffs, seven thereof are citizens and residents of Mississippi. The defendant, Humble Oil & Refining Company is a non-resident corporation. Mrs. Anna F. C. Martin died on December 3, 1942, leaving a will with a life estate in property in question to Anna F. B. Martin Eslick for the term of her natural life and for the use and benefit of Frederick Martin Eslick for the term of his natural life, and upon the death of the survivor of said beneficiaries the trust was to terminate and the then corpus was to be delivered to the heirs of Mrs. Anna F. C. Martin (R. 165). The Supreme Court of Mississippi in judgment of November 12, 1956, held that the oil, gas and mineral lease executed by the trustees was adjudged to be a valid lease and in full force and effect from the date thereof and that the surviving trustee would collect any royalties payable under the oil, gas and mineral lease as trustee (R. 165). Subsequently, on rehearing, through opinion of January 28, 1957, aforesaid, the Court amended its opinion with statement that "The Court's decision involved a construction of the will of the decedent and the determination of the question as to the right of Mrs. Eslick during her lifetime to be paid the royalties derived from an oil lease executed subsequent to the death of the testatrix. *Exeept to the extent that such decision might affect the validity of any oil and gas lease executed by the testamentary trustees,* the question of the validity of oil and gas leases was not passed upon or decided by the Court." (Emphasis ours) (R. 189). The opinion and judgment of the United States District Court and of the United States Court of Appeals for the Fifth Circuit aforesaid are contrary to the opinion of the Supreme Court of Mississippi in the cause involving the very subject matter and also to case law in Mississippi and in

the Circuit Court of Appeals for the several Circuits and the Supreme Court of the United States.

The sole surviving trustee, J. Gaillard Martin, the life tenants, and the ultimate remaindermen are indispensable parties. Berkely Plantation here involved was under oil, gas and mineral lease at time of death of Mrs. Anna F. C. Martin. The trustee under the last will and testament of the deceased either had a right to execute lease, which was a warranty conveyance, or to his day in court for a contrary decision which would require of him forfeiting income and funds to the estate obtainable from royalty or production of an undivided 1/30th interest claimed for Respondents which would reduce that to be received by him from Petitioner and thereby reduce the corpus of the trust estate; and the two individuals identified as holders of life estates should have been named parties defendant in addition to the trustee; and the ultimate remaindermen should have been so named, and these parties are Mississippians, as are all of the Respondents except one. The April 21, 1945, lease had ten producing wells therefrom when the case was tried (R. 330). Under the authority of *Thompkins* v. *Erie R. Co., supra,* the general law of the State of Mississippi controls the rights of the parties, but not so with the opinion of the Circuit Court of Appeals here complained of; and the opinion of the Circuit Court of Appeals is contrary to the decisions of other Circuits and to this Court.

> "The general rule is that, when two or more trustees hold property jointly, both or all are necessary and indispensable parties in any action concerning it." *Caylor* v. *Cooper*, 165 Fed. 757. See also *O'Hara* v. *MacConnell*, 93 U.S. 150, 23 L. Ed. 840; *Thayer* v. *Life Association*, 112 U.S. 717, 5 S. Ct. 355, 28 L. Ed. 864; *Billings* v. *Aspen*, 51 Fed. 338; *Franz* v. *Buder*, 11 F.2d 854 (C.C.A., 8th); *Young* v. *Powell*, 179 F.2d 147 (C.

C.A., 5th); *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 1283; *Yandell* v. *Wilson*, (Miss.) 183 So. 382.

"A court can take no jurisdiction of the legal title of trust property without making the trustee a party." *Phipps* v. *Tarpley*, 24 Miss. 579. See also *Shelby* v. *White*, (Miss.) 130 So. 343.

At all times Petitioner has denied its liability under the law, and has sought to demonstrate this through pointing to the Supreme Court of Mississippi opinion and amendment thereto. Petitioner's answer to the complaint and amendment thereto contain such denials and also affirmatively plead defenses, including the fact that under the Mississippi Supreme Court decision the then only surviving trustee, J. Gaillard Martin and Francis C. Martin were adjudged under the last will and testament of the deceased to "hold, own and manage" the property, and which carried with it the right to execute oil, gas and mineral lease (R. 164-165). In dealing with this right of sale and use of property, said will provided for "Anna F. B. Martin Eslick to have my interest in Berkely, also the Pass Christian property, or if sold, what was invested therefrom." (R. 159). Mississippi is place of residence of Mrs. Eslick. The lease of the testamentary trustees vested in Humble Oil & Refining Company right to production of oil and gas from the Berkely Plantation property in which the deceased owned an undivided 1/6th interest in the minerals. This lease was a warranty lease (R. 82 and 202). Surely all the parties affected by a trust must be joined in any action by anyone of them against the trustees to restore the corpus of the trust, but which was not done here; and surely any litigation that would restrict the trustee or un-do his warranties or affect other beneficiaries and holders of a life estate would necessarily require all of those to be affected

to be identified as parties, and when this is done, the jurisdiction of the Federal Court is at an end because there would not be the needed diversity of citizenship. The general law is that a trustee selling, or failing to sell, "the trust property in violation of the trust agreement or in breach of his duties is liable for the resulting damages." 90 *C.J.S.*, Section 299, Trusts, p. 465. Since the property was to be "held, owned and managed" by the trustees named and their successors in office for the use and benefit of Anna F. B. Martin Eslick for the term of her natural life, the trustees were obligated to do best by the holder of the life estate. *Wyse* v. *Dandridge et al.*, 35 Miss. 672. "* * * power of sale will be implied, wherever duties are imposed on the trustee which cannot be performed without it." *Corley* v. *Bishop*, (Miss.) 58 So. 360.

If the opinion of the Circuit Court of Appeals for the Fifth Circuit in this cause is to prevail, then the trustee will be guilty of a breach of warranty in the oil, gas and mineral lease, and your Petitioner will be entitled to require the trustee to return funds heretofore paid under provision of the judgment of the Supreme Court of Mississippi providing for the payment of all oil royalties to the trustee; and all of this will be contrary to the law existing in Mississippi which provides "that the rule is that all persons who are materially interested legally or equitably in the subject matter of a suit ought to be made parties therein." *Lewis* v. *Jefferson*, (Miss.) 161 So. 669. The opinion of the Supreme Court of Mississippi provided that it was the duty and obligation of the trustee "to collect any royalties payable under said oil, gas and mineral leases as such trustee; and subject to the approval of the Chancery Court of Harrison County, Mississippi, he is hereby authorized and directed to reinvest said funds and to pay the interest derived from the investment of said funds to the

beneficiaries under said trust." (R. 165). In considering the duties and obligations of parties in relation to oil and gas as compared to other minerals, the Supreme Court of the United States has defined the nature of oil and gas and what constitutes waste, contrary to what the said District Court and said Circuit Court of Appeals say, as follows:

> "No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of this right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in place of deposit. In Brown v. Spilman, 155 U.S. 665, 669, 670, 15 S. Ct. 245, 247, 39 L. Ed. 304, 305, these distinctive features of deposits of gas and oil were remarked upon." *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729.

Berkely Plantation consisted of 1350 acres of land and Mrs. Anna F. C. Martin at her death on December 3, 1942, owned an undivided 1/6th interest of minerals therein which was then under lease to the Humble Oil & Refining Company (R. 295). The heirs at law of Mrs. Anna F. C. Martin, deceased, were J. Gaillard Martin, Francis C. Martin, Anna F. B. Martin Eslick, and Eugene Martin, living children, and Mary Frances Martin Dent and Benson B. Martin, Jr., children of Benson B. Martin, deceased son of testatrix. The lease here in controversy was executed on April 21, 1945 (R. 202). Subsequently, Eugene Martin departed this life, leaving Mrs. Mabel W. Martin, his widow, as his only heir at law. The judgment of the Supreme Court of Mississippi provided that the 1/6th interest of Mrs.

Anna F. C. Martin in Berkely Plantation "was devised to J. Gailliard Martin and Francis C. Martin" as trustees under the will of Anna F. C. Martin and the 1/6th interest in Berkely Plantation was "to be held, owned and managed by the trustees named and their successors in office for the use and benefit of Anna F. B. Martin Eslick for the term of her natural life and at her death for the use and benefit of Frederick Martin Eslick for the term of his natural life, and upon the death of the survivor of said beneficiaries the trust is to terminate and the then corpus is to be delivered to the heirs of Anna F. C. Martin." (R. 164-65).

The undisputed testimony of Don Caldwell, geologist, was that "serious drainage would have occurred in certain sands" if the property had not been produced (R. 327). Gulf Oil Corporation had producing wells in the area (R. 328). He testified, "They would have been seriously drained." (R. 337).

The opinion and judgment of the Circuit Court of Appeals violate the general rules of construction as to contracts and are contrary to opinions of the Supreme Court of the United States, to opinions of other Circuit Courts of Appeals and to other opinions of the Fifth Circuit; and in the very nature of things the property rights of parties other than Respondents and of said Respondents are being taken away by a failure of the court involved to recognize the judicial rights of the parties, and in violation of the 5th and 14th Amendments to the Constitution of the United States. The fugitive nature of oil and gas requires action. A long time ago the Supreme Court of the United States said of oil and gas the following:

> "They belong to the owner of the land, and are part of it, so long as they are on it or in it or subject to his control; but when they escape and go into other land,

or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land, and taps a deposit of oil and gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. Brown v. Vandergrift, 80 Pa. 147; Westmoreland & C. Nat. Gas Co.'s appeal (130 Pa. 235), 18 Atl. 724 (5 L.R.A. 731)." *Brown* v. *Spilman*, 15 S. Ct. 247, 155 U.S. 665.

In the case of *Ohio Oil Co,* v. *Indiana, supra,* in addition to that already quoted, the Supreme Court of the United States has stated that oil and gas, like other minerals, are situated beneath the surface of the earth, but in many other respects such minerals are different because they have no fixed status. They have the power of self-transmission. If the opinion here complained of had prevailed, the oil and gas, except for that done by the Humble Oil & Refining Company through lease of the trustees, would have been recovered by oil companies under leases on adjoining properties. (R. 336). The life tenants and ultimate remaindermen would have lost that of value in oil and gas and the trustee would be charged with dereliction of duty and with having permitted waste of oil and gas which otherwise should have inured to the benefit of the ultimate remaindermen. Now that the trustees have done that which is reasonable and proper and permitted and authorized and contemplated under the last will and testament of the deceased and under the opinion of the Supreme Court of Mississippi and under the general law of the land, still they are about to be required to suffer for that which they were authorized to do and had to do and did for the preservation of the property. The opinion of the Circuit Court of Appeals deprives Petitioner of the 1/30th leasehold interest in and to oil and gas in and under the Berkely Plantation and it takes from the life tenant and the second life tenant their right to income from the funds from the royalty of the 1/30th interest now being held by the trustee under or-

der of the Supreme Court of Mississippi, and the 4/5th interest held by the ultimate remaindermen are likewise affected by this unusual opinion of the United States District Court and of the Circuit Court of Appeals.

Before there was a trial, the United States District Court first held that the original suit of the plaintiffs had failed to name indispensable parties and a copy of letter opinion of said court, dated March 21, 1959, is attached hereto as Appendix "A". Immediately after this March 21, 1959, opinion, attorneys for plaintiffs directed letter to the United States District Judge on March 24, 1959, stating effect of the letter opinion, and a copy thereof is attached hereto as Appendix "B". The trial court thereupon reversed prior position and held that the additional parties were not necessary parties and a copy of the second letter opinion, dated May 21, 1959, which is contradictory of the first, is attached hereto as Appendix "C". Thereupon, a trial was had before the court without a jury. At that time the court concluded that there would first be decided by the court the question of whether or not the plaintiffs were entitled to relief under the complaint and the trial was accordingly separated so that this issue would be heard first and if it should be found that the plaintiffs were entitled to relief sought, there would subsequently be heard the question of what damages may be recovered. (R. 71). Copy of the opinion of the court which is reported in 199 F. Supp. 648 and printed in the record (R. 426-435) is attached hereto as Appendix "D". Subsequently, the court amended his findings of fact (R. 444-46) and a copy thereof is attached hereto as Appendix "E". The judgment of the trial court is printed in the record (R. 446-49) and copy thereof is attached hereto as Appendix "F". Thereafter, on appropriate application therefor and substantially on agreement of the parties relating to appeal on the question of jurisdiction and liability, the trial court entered judgment or order

(R. 453-55) under authority of 28 U.S.C., Section 1292, and a copy of said judgment or order is attached hereto as Appendix "G".

There was and is a genuine dispute between the parties. The District Court and said Circuit Court, we think, have erroneously sought to maintain jurisdiction maybe partly because a case with some similarity styled *Hudson v. Newell*, 172 F.2d 848 and 174 F.2d 546, was decided adverse to one of the judges and he was unable to differentiate between that case and this one. If the District Judge was correct in the first opinion, he was in error in his second opinion with reference to necessary or indispensable parties. This must have been a close question for the District Judge. One of the three judge panel deciding the case for the Circuit Court of Appeals dissented in each instance with statement of dissent in the court opinion on petition for rehearing in words as follows: "I am of the opinion there are absent indispensable parties. This would deprive this court of jurisdiction and leave the matter up to the Supreme Court of Mississippi, which I believe is the proper tribunal to decide this Mississippi question. Therefore I respectfully dissent." The opinion of the Circuit Court of Appeals on direct appeal is printed in the record (R. 471, 483) and a copy thereof is attached hereto as Appendix "H". The opinion of the Circuit Court of Appeals on petition for rehearing, with dissent thereto, is printed in the record (R. 530-31) and a copy thereof is attached hereto as Appendix "I". With the decision of the trial court that the parties other than your Petitioner were not necessary parties, the trial court then concluded that under the judgment of the Supreme Court of Mississippi the surviving testamentary trustee had no right or authority to execute oil, gas and mineral lease, but apparently recognizing that the Supreme Court of Mississippi did not so hold. The opinion of the Supreme Court of Mississippi

is printed in the record (R. 170-187) and a copy thereof is attached hereto as Appendix "J". The opinion of the Supreme Court of Mississippi on suggestion of errors is printed in the record (R. 188-89). and a copy thereof is attached hereto as Appendix "K".

V

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred as follows:

1. In holding that under the authority of 28 U.S.C., Section 1332(a) (1), the United States District Court had jurisdiction even though no kind of relief could be granted without upsetting at least a part of the April 21, 1945, oil, gas and mineral lease executed by the trustee or trustees, and without disturbing property rights of the holders of two separate life estates and four of the five original ultimate remaindermen who ratified the oil, gas and mineral lease of the trustees.

2. In holding that the surviving trustee or trustees did not have right to execute valid oil, gas and mineral lease, as was sought to be done, to bind the ultimate remaindermen since the power of the trustees was fixed under the last will and testament of Anna F. C. Martin, Deceased, as decided by the Supreme Court of Mississippi in case of *Martin* v. *Eslick*, 90 So.2d 635 and 92 So.2d 244, wherein said trustee or trustees were adjudged right to "hold, own and manage" the property, which carried with it the right to execute oil, gas and mineral lease.

3. In construing the last will and testament of Anna F. C. Martin and said April 21, 1945, lease contract contrary to the interpretation given to same by the Supreme Court of Mississippi and contrary to general applicable law and in conflict with local decisions and other decisions of the same

Circuit Court and of the Circuit Court of Appeals for other circuits.

4. In interpreting the last will and testament of said Anna F. C. Martin as it applies to the April 21, 1945, oil, gas and mineral lease in violation of the 5th and 14th Amendments to the Constitution of the United States, depriving Petitioner and others interested in the lease contract and in oil and gas production of vested property rights guaranteed to it and them.

VI.

REASONS RELIED ON FOR GRANTING THE WRIT.

1. The court below has decided that a testamentary trustee and parties holding the first and second life estates under a will and four ultimate remaindermen are not indispensable and necessary parties to suit of other residents of the State of Mississippi seeking to upset existing oil, gas and mineral lease contract with at least ten producing oil wells operating under said lease when such in the very nature of things takes from those beneficially interested and the trustee that to which they are entitled without their day in court.

The court below had jurisdiction if there existed the needed diversity of citizenship and the required amount for jurisdictional purposes. To hold that the court below had jurisdiction, it was necessary to conclude that the testamentary trustee was not a necessary party even though such trustee, with belief that he had right or authority so to do, executed oil, gas and mineral lease on which there have been successfully completed at least ten producing oil wells, and from the production all royalties have been paid to the trustee and retained by him as he was ordered so to do by the Supreme Court of Mississippi dealing with the very subject matter. It was also necessary

for the court to conclude that Mrs. Anna F. B. Martin Eslick, holder of first life estate, and Frederick Martin Eslick, holder of second life estate, and four of the five ultimate remaindermen were not necessary parties, even though those interested as life tenants or life estate holders by the holding of the trial court would be affected because a part of what would otherwise be and become the corpus of the estate would go to the plaintiffs in the original lawsuit and the lease all of the parties had executed, and by which they were bound, would be upset. If the opinion of the Circuit Court of Appeals withstands this attack, money which has already been paid to the trustee as oil royalties will have to be withdrawn from the corpus of the estate and subsequently accruing oil royalties which otherwise would go into the estate would be diverted to the plaintiffs. It is this jurisdiction question, so very important to the litigating public, which should be jealously protected as contemplated by law and for the protection of those affected thereby.

The case relied upon by the opposition and the court below is that of *Hudson* v. *Newell*, 172 F.2d 848 and 174 F.2d 546. What that case holds is that where the plaintiff claims the full title to a tract of land and title thereto is also claimed by several other parties, some of whom are residents of states other than that of the plaintiff and some are residents of the state of the plaintiff, the plaintiff may file a suit against those non-resident claimants and the court has jurisdiction of that suit without requiring the resident claimants to be made parties thereto; but in such action the relief granted shall be limited to the interest claimed by the non-residents and the interest claimed by the resident defendants shall be expressly excepted from the effect of the decree. The language of the court announcing the holding here mentioned is as follows:

"The original complaints asked a decree that the plaintiffs are the true owners of the land and of the mineral rights therein and of the oil and gas removed from it by the defendant oil companies. If they can prove the land and oil are theirs we see no reason why they should not have judgment for them *against those sued*; possible claimants not in court would not of course be bound by the result. If such claimants' title is shown as a defense *their interest can be saved from the decree.*" (Emphasis ours) *Hudson* v. *Newell, supra.*

In the statements of fact in the *Hudson* v. *Newell* case the court makes clear which of the adverse claimants were made parties and which were not, and these facts show to whom the court referred when it used the language in the above quoted section "against those sued" as follows:

"The plaintiffs, * * * brought in the Federal Court the present four suits, which embrace all the land save 20 acres, *making parties only those claimants to each tract as to whom diversity of citizenship existed, and omitting the others.* * * * The first counts seek only to establish by decree the plaintiffs' right in land and oil produced as against persons who are in court. They pray for a decree giving them the entire right, but they cannot be granted that, for it is evident that a part of the adverse claim is not represented before the court, and will have to be excepted, leaving those claimants unaffected." (Emphasis ours). *Hudson* v. *Newell, supra.*

If the testatrix had set up two trusts covering the 1/30th interest in Berkely Plantation, one with a trustee being a resident of the State of Texas, and the other with a trustee being a resident of the State of Mississippi, and each trustee being entrusted with one-half of the 1/30th interest, then, and in that event, under the holding of *Hudson* v. *Newell* the District Court would have jurisdiction of a suit filed by these plaintiffs against the Texas trustee and the Mississippi trustee would not be an indispensable party thereto, but the relief which the Federal Court could grant

could not exceed the one-half interest vested in the Texas trustee.

The decision of the court below is in conflict with decisions of other Circuit Court of Appeals and in conflict with decisions of this Court relating to parties and the rights and responsibilities of the trustee. For sake of brevity, we will quote only four cases.

> "The general rule is that when two or more trustees hold property jointly, both or all are necessary and indispensable parties in any action concerning it. See McRea vs. Branch Bank, 19 How. 376, 15 L. Ed. 688; O'Hara v. MacConnell, 93 U.S. 150, 23 L. Ed. 840; Thayer v. Life Association, 112 U.S. 717, 5 S. Ct. 355, 28 L. Ed. 864; American B. S. v. Price, 110 U. S. 61, 3 S. Ct. 440, 28 L. Ed. 70; Billings v. Aspen, etc., 51 Fed. 338, 2 C.C.A. 252." *Caylor* v. *Cooper*, 165 Fed. 757, 762.

> "The essential purpose of the applicable rule which the district court properly followed requires all the beneficiaries of a trust to be joined in an action by any one of them against the trustees to restore the corpus of the trust, see e.g., Franz v. Buder, 8 Cir., 1926, 11 F.2d 854, certiorari denied 1927, 273 U.S. 756, 47 S. Ct. 459, 71 L. Ed. 876; Young v. Powell, 5 Cir., 179 F.2d 147, certiorari denied 1950, 339 U.S. 948, 70 S. Ct. 804, 94 L. Ed. 1362, in order to avoid the unfair repetition of actions against the defendant trustees which could result from individual relitigation by each successive beneficiary if the first plaintiff lost. * * *

> "* * * As we have already held that the other beneficiaries are indispensable parties when one seeks to assert a claim for surcharge and restoration of corpus on behalf of the trust against the trustee himself, we are thus presented with the question whether the requirement is different when the claim in behalf of the corporate defendant is against a third party." *Matthies* v. *Seymour Manufacturing Company*, (C.C.A., 2d) 270 F.2d 365, 370, 373.

"It is well settled that a bailee such as a carrier, who has not converted the property in his hands but has negligently suffered injury to it or by unreasonable delay has caused loss to its owner through a lessened market value, may be held liable for damages, but the owner cannot reject the property if of any value. Southern Express Co. v. Hanaw, 134 Ga. 445, 460, 67 S. E. 944, 137 Am. St. Rep. 227; Brown, Shapleigh & Co. v. Clayton, 12 Ga. 564, 565; Wilensky v. Central of Ga. Ry. Co., 136 Ga. 889, 72 S. E. 418, Ann. Cas. 1912D, 271; 9 Am. Jur., Carriers, § 560." *Robinson v. Georgia Sav. Bank & Trust Co.*, (C.C.A., 5th) 106 F.2d 944, 947, 948.

"Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. In the absence of such a party a Florida court may not proceed to adjudicate the controversy." *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed. 1283, 1292.

2. The testamentary trustees had right to execute April 21, 1945, oil, gas and mineral lease to Humble Oil & Refining Company.

The trustees were authorized to hold, own and manage the property by the Supreme Court of Mississippi. The rights and powers of a trustee in the very nature of things depend upon the nature of the trust and that contained in the trust instrument and, in this case, in the will itself. The Supreme Court of Mississippi recognized this and even though said Court did in its second opinion, on suggestion of error, alter its first opinion, still there was no holding that the testamentary trustees did not have a right to lease the property. At least the Court did require of the testamentary trustee that he collect all rents and royalties and identify same with the corpus of the estate.

"It is to be observed, that the legal title was in the trustee, who also had possession of the property. Hav-

ing the legal title, he was invested with the power to sell the property, even to the prejudice of his cestuis que trust, so far as the rights of a party purchasing, and obtaining a conveyance of the legal title, bona fide, and for a valuable consideration, were concerned." *Wyse* v. *Dandridge et al.*, 35 Miss. 672.

"It may be stated as a general proposition that the power of sale will be implied, wherever duties are imposed on the trustee which cannot be performed without it. There is some conflict in the authorities on this proposition; but the weight, together with the better reason, sustains this proposition." *Corley* v. *Bishop*, (Miss.) 58 So. 360.

3. The court below, in opinion here complained of, is in conflict with like courts in other Circuits and with opinions of the Supreme Court of Mississippi relating to the rights of the parties in this cause, and contrary to the opinions of the Supreme Court of the United States and violative of the 5th and 14th Amendments to the Constitution of the United States, to deprive Petitioner of due process and equal protection of the law.

In the case of *Thompkins* v. *Erie R. Co.*, *supra*, the law of Mississippi should control, but the court below did violence to the Thompkins case. It is true that the Supreme Court of Mississippi in its original opinion held that the lease was valid and was in full force and effect from the date thereof. It is further true that in the second opinion, based on suggestion of errors, the court held as follows:

"The court's decision involved a construction of the will of the decedent and the determination of the question as to the right of Mrs. Eslick during her lifetime to be paid the royalties derived from an oil lease executed subsequent to the death of the testatrix. *Except to the extent that such decision might affect the validity of any oil and gas lease executed by the testa-*

mentary trustees, the question of the validity of oil and gas leases was not passed upon or decided by the court. It was erroneous, therefore, to incorporate in the judgment a general adjudication of the validity of oil and gas leases." *Martin* v. *Eslick*, (Miss.) 92 So.2d 244 (Emphasis ours).

Judge McCord for the Circuit Court of Appeals for the Fifth Circuit held contrary to what the court has sought to hold in this cause as follows:

"We are of opinion that parties are indispensable when their interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that their interest would be directly affected by the decree. This is the definition found in *Shields* v. *Barrow*, 58 U.S. 130, 17 How. 130, 158 L. Ed. 158, and *Barney* v. *Baltimore*, 73 U.S. 280, 6 Wall. 280, 18 L. Ed. 835." *Keegan* v. *Humble Oil & Refining Company*, (C.C.A., 5th) 155 F.2d 971.

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's rights, without the party being either actually or constructively before the court." *Mallow* v. *Hinde*, 12 Wheat. 193, 198, 6 L. Ed. 599.

This is a case dealing in part with attempt to obtain a declaratory judgment. The court below failed to recognize and gave expression of law contrary to decision from the Tenth Circuit.

"Ordinarily, in an action for a declaratory judgment, all persons interested in the declaration are necessary parties." *Franklin Life Ins. Co.* v. *Johnson et al.*, (C.C.A., 10th) 157 F.2d 653, 658.

"If the absent party's legal interest is cognizable in the suit but is not joint with that of the plaintiff or the defendant, and he should be joined in order to afford complete relief to those already parties, then he is a necessary party and must be joined if subject to the process and within the venue of the court." *Samuel Goldwyn, Inc., et al.* v. *United Artists Corporation,* (C.C.A., 3rd) 113 F.2d 703, 707.

WHEREFORE, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court, and that this petition should be sustained and writ of certiorari issued as contemplated by law.

HUMBLE OIL & REFINING COMPANY,
A Corporation, *Petitioner,*

By .....,
M. M. ROBERTS,

By .....,
L. V. RUSSELL,
Of Attorneys for Petitioner,
Hattiesburg, Mississippi,

By .....,
JOE A. THOMPSON,

By .....,
ROBERT M. BASS, JR.,
Of Attorneys for Petitioner,
Jackson, Mississippi.

APPENDIX "A".

UNITED STATES DISTRICT COURT
Southern District Of Mississippi
Gulfport, Mississippi

Chambers of
Sidney C. Mize
District Judge

March 21st, 1959.

Hon. Landman Teller, Atty.,
Vicksburg, Miss.
Hon. L. C. Guinn, Atty.,
Natchez, Miss.
Hon. M. M. Roberts, Atty.,
Hattiesburg, Miss.
Hon. Joe A. Thompson, Atty.,
Hattiesburg, Miss.

Gentlemen:

Re: Martin et al. v. Humble Oil & Refining Co. No. 806.

I have considered the record and your briefs in the above case upon the motion to require plaintiff to bring in other parties and have reached the conclusion that the other interested parties are indispensable and must be brought in but I do not believe it will destroy jurisdiction of this court. The Miss. Supreme Court declined to rule upon the validity of the lease but there seems to be no controversy between the omitted parties as to the validity because they have ratified it and the trustee made it and is required to account to the beneficiary for all oil royalties under the judgment of the Supreme Court. These parties are entitled to be heard because they say it is a valid lease and that the trustee must account to the bene-

ficiary under the judgment of the court, while the plaintiff says it is not a valid lease. The plaintiff herself is a citizen of a different state from all the other parties and therefore this court has jurisdiction but the other parties are vitally interested in the outcome of the litigation.

An order may be drawn requiring plaintiff to make the parties named in the motion defendants in the cause. If a lack of jurisdiction should arise any time in the case of course it would require dismissal but at this time I fail to see a lack of jurisdiction.

With kindest regards to all of you, I am,

Sincerely yours,

s/ S. C. Mize.

APPENDIX "B".

Law Offices
TELLER & BIEDENHARN
1205 Monroe Street-Power Company Building
VICKSBURG, MISSISSIPPI

Landman Teller
James P. Biedenharn

Post Office Box 22
Telephone 4820

George W. Rogers, Jr.

March 24, 1959

Hon. S. C. Mize
U. S. District Judge
Gulfport, Mississippi

Re: Mabel W. Martin et al v. Humble Oil & Refining Company, Civil Action No. 806, Vicksburg Docket

Dear Judge Mize:

Receipt is acknowledged of yours of March 21st with reference to the above matter.

From this communication we gather that the conclusion which you reached was predicated upon the assumption that the jurisdiction of the Court would not be destroyed by requiring us to bring in additional parties. Should this decision be adhered to, then we are apprehensive, that the consequence will be otherwise than your Honor felt and declared in your letter, because it will then be apparent on the very face of the record that there is no longer any diversity and consequently a lack of jurisdiction.

Under these circumstances we would appreciate a reconsideration of this matter and, if your Honor will permit, a further opportunity to briefly summarize our views. If such a hearing will be accorded to us, then we take it that the Court will, pending that hearing, defer the consideration of the entry of any order herein.

With kindest regards,

Sincerely yours,

Teller, Biedenharn & Rogers
By: s/ Landman Teller
LT: la
cc: Mr. M. M. Roberts
Mr. Joe A. Thompson
Mr. L. C. Gwin

APPENDIX "C".

UNITED STATES DISTRICT COURT
Southern District of Mississippi
GULFPORT, MISSISSIPPI

May 21, 1959

Chambers of
Sidney C. Mize
District Judge
Honorable Landman Teller
Attorney at Law
Vicksburg, Mississippi
Honorable L. C. Gwin
Box 375
Natchez, Mississippi
Honorable M. M. Roberts
Attorney at Law
Hattiesburg, Mississippi
Honorable Joe A. Thompson
Box 1368
Hattiesburg, Mississippi

Re: Mabel W. Martin et al.
v. No. 806
Humble Oil & Refining Co.

Gentlemen:

I have considered further the motion of the Defendant to require the Plaintiff to bring in indispensible parties and to dismiss for lack of jurisdiction, which defense was also raised in the second paragraph of the answer, and have reached the conclusion that I was in error in my opinion of March 21, 1959.

The parties named in the motion are not indispensible to the litigation between the Plaintiff and the Defendant. The suit, on a careful analysis of the complaint, is simply one brought by a remainderman against the Defendant, alleging waste to the remainder created in the property. The Plaintiff did not consent to the commission of waste, and if it be proven that waste has been committed, then anyone damaged thereby holding an interest in the remainder is entitled to sue. What is waste is a matter to be determined on the merits. See Moss Point Lbr. Co. v. Board of Supervisors of Harrison County, 42 So. 290; Sparkman v. Hardy, 78 So.(2) 584.

A party dealing with a life tenant is charged with notice of the extent of the life tenant to deal with the property and if the life tenant exceeds his authority that does not relieve the one purchasing from the life tenant the duty of responding in damages to the remainderman for waste. Since this action is one brought by one of the co-tenants in the remainder who has not consented to the commission of waste, he is entitled to proceed against the one committing waste without joining the other co-tenants. I think the

Re: Mabel W. Martin et al. v. Humble Oil & Refining Co. #2

case of Calcote v. Wise, 68 So. (2) 477 is applicable and under that authority the co-tenants are not indispensable parties.

It is the duty of the Court to retain jurisdiction and grant whatever relief, if any, it can to which the Plaintiff is entitled, if any, and if any relief properly can be given without joining other parties, then the Court should do it. Hudson v. Newell, 172 Fed. (2) 848.

I will, therefore, withdraw my letter opinion of March 29 and overrule the motion to require the Plaintiff to bring in additional parties.

With kindest regards, I am

Sincerely yours,

s/ S. C. Mize.

APPENDIX "D".

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

MABEL W. MARTIN ET AL.,
v.
HUMBLE OIL & REFINING COMPANY, A CORPORATION.

Civil Action No. 809.

Opinion of the Court.

This is an action by Mrs. Mabel W. Martin, a vested remainderman, along with the other Plaintiffs, against the Defendant for damages to the inheritance and waste committed thereto. The background to this litigation is fully disclosed in the decision of the Supreme Court of Mississippi in the case of Martin, et al v. Anna F. B. Eslick, et al, reported in 90 So.(2) 635 and 92 So.(2) 244. The litigation grows out of the construction of the will of Mrs. Anna F. C. Martin, which will was construed by the Supreme Court of Mississippi in the citations hereinabove referred to.

During her lifetime Anna F. C. Martin owned a 1/6 interest in Berkely Plantation in Adams County, Mississippi, a. d it is out of this interest that the claims of the various parties here arise. Anna F. C. Martin, along with her coowners in Berkely Plantation, on July 1, 1940, executed an oil, gas lease to John F. Perryman covering all of the Berkely Plantation. The Defendant in this case, Humble Oil & Refining Company, became the owner of that lease by assignment. The primary term of the lease was five years and during that time no oil, gas or other mineral was pro-

duced. Anna F. C. Martin died testate on December 3, 1942, owning at the time of her death the aforesaid 1/6 interest. She left a will which created a testamentary trust devising her 1/6 interest in Berkely Plantation to J. Gaillard Martin and Frances C. Martin as Trustees for the use of Anna F. B. Martin Eslick for the term of her natural life and at her death, for the use and benefit of Frederick Martin Eslick for the term of his natural life, and upon the death of the survivor of this life tenancy the trust should terminate and the corpus delivered to the heirs of Anna F. C. Martin, Testatrix.

At the time of the death of Anna F. C. Martin her son, Eugene Martin, was living and was one of the heirs of Anna F. C. Martin, along with the other children of Anna F. C. Martin. He died after his mother, leaving at the time of his death the plaintiff in this case, Mrs. Mabel W. Martin, as his widow and sole devisee under his will. They had no children. Mrs. Mabel W. Martin is one of the remaindermen under the will of Mrs. Anna F. C. Martin and, before the filing of this lawsuit, she had conveyed an interest out of her interest to the other plaintiffs in this lawsuit. Mrs. Anna F. C. Martin had five children, each one of whom are her heirs and devisees and as such would inherit a 1/5 interest of the 1/6 interest in Berkely Plantation as remaindermen.

The Trustees, under the will, and the life tenants under the will, executed an oil and gas lease to the Defendant in this case on April 21, 1945, and this lease was for a primary term of five years, and covered, or undertook to cover, all of the Berkely Plantation, and contained a general warranty of title. All of the remaindermen other than the Plaintiff herein executed separate leases for primary terms of five years, describing all the whole of Berkely, with the general warranty of title, and dated the

same day as the one executed by the Trustees under the life tenants on April 21, 1945. Frederick Martin Eslick, a life tenant, executed one on November 4, 1946, ratifying the lease executed by the Trustee and by his mother and father, and also in October, 1946, J. Gaillard Martin, individually and as the sole surviving Trustee, ratified the lease executed by the Trustees and by Anna F. B. Martin Eslick and her husband, dated April 21, 1945. The Plaintiff herein, Mrs. Mabel W. Martin, refused and declined to execute any type of lease and specifically refused to execute the lease known as the ratification lease, contending all the way through that she had a vested interest in the remainder and that she was unwilling to execute a lease or join in the ratification of any lease. She at no time executed a lease or ratified a lease, nor did her husband, Eugene Martin, in his lifetime, execute any lease or join in the ratification of any lease.

By virtue of these conveyances the lessee, Humble Oil & Refining Company, acquired an oil, gas and mineral leasehold on an undivided 29/30 of the Berkely Plantation and the other 1/30 interest was owned by the Plaintiff, Mrs. Mabel W. Martin. The first oil and gas well was drilled on the property in 1950 and was successful. Several other oil wells, since that time, have been brought into production and there have been some failures. The question for determination here is whether or not the Plaintiff, Mrs. Mabel W. Martin, as a co-tenant, is entitled to bring suit and recover a monetary judgment for damage to the inheritance and waste.

Many questions are raised by the litigants. There is no dispute about the jurisdiction of the Court, unless indispensable parties were omitted which, if required to be brought in, would have destroyed the jurisdiction. This matter was raised first by motion to dismiss and again at

the conclusion of the trial and is argued by the Defendant at length at the present time. On March 21, 1959, in a letter opinion to the parties the Court was of the opinion that certain other parties were indispensable—that is to say, the other co-tenants in the remainder of the estate. There are other heirs, several of them, not necessary to name, who are citizens of the State of Mississippi, and if they are indispensable parties, the jurisdiction would be destroyed. In this letter opinion of March 21, 1959, I reached the conclusion that they were indispensable parties, but the question was re-argued and by letter opinion dated May 21, 1959, the Court reached the conclusion it was in error in its opinion of March 21, 1959, concluded and so held that these parties were not indispensable to the rights of the Plaintiff as sought in the present litigation.

The suit is brought by the remaindermen against the Defendant, alleging waste to the remainder created in the property. The Plaintiff at no time ever consented to the commission of waste and under the law of Mississippi a co-tenant has the right to sue for damages to the inheritance in so far as his individual, undivided interest is concerned. See the case of Moss Point Lumber Co. v. Board of Supervisors of Harrison County, 42 So. 290; Spartan v. Hardy, 78 So.2d 584. It is settled in Mississippi that a party dealing with a life tenant is charged with notice of the extent of the life tenancy and of the right of the tenant to deal with the property, and if the life tenant exceeds his authority, the one purchasing from him is not relieved from the obligation to respond in damages to the remaindermen for waste, and the co-tenant is entitled to proceed against the one committing waste without joining the other tenants. Calcote v. Wise, 68 So.2d 477. I have considered again the question of jurisdiction and am of the opinion that the co-tenants are not indispensable parties and that, therefore, the Court does have jurisdiction.

The Defendant contends that the lease executed by the life tenants and the Trustees covering the entire property is a valid lease and that the ratification leases executed by the co-tenants of the Plaintiff herein were valid leases, and that the Plaintiff has no vested rights in anything at this time; and further contends that the litigations in the State courts of Mississippi are res adjudicata, further contending that the Plaintiff is estopped to assert the cause of action as alleged in the complaint. The law of Mississippi will control the rights of the litigants herein, as the property is located in Mississippi. The Plaintiff is a citizen of Florida and after the death of her husband she returned to Mississippi only a few times, and under the evidence in this case there is nothing to base estoppel on.

The interest of the Plaintiff as a remainderman became vested immediately upon the death of the Testatrix and the Plaintiff is not a remote or ultimate remainderman. She has a vested interest now and had immediately upon the death of her husband, who had a vested interest immediately upon the death of his mother, the Testatrix. A very recent case in the Supreme Court of Mississippi with reference to when the interest vests in remaindermen is that of McClellan et al v. Bank of Clarksdale, 119 So.2d 262. The Trustees under the will for the benefit of the life tenants and the life tenants individually had no right to execute a gas and oil lease or otherwise sell or dispose of the gas and oil under the law in Mississippi. An oil, gas and mineral lease under the law of Mississippi is a sale and conveyance of an interest in real property and when one purchases from a life tenant or Trustees for the life tenants, he is charged with knowledge of the power of such persons. Under the will in the present case, as construed by the Supreme Court of Mississippi, no power of sale was given to the Trustees and when they undertook to execute the gas and oil lease they exceeded their powers. See the case of

Stokely v. State et al, 115 So. 563, wherein the Supreme Court of Mississippi held that the Trustees of the State Insane Hospital were without power to execute an oil and gas lease for the exploration of minerals. Likewise, it was held in the case of Martin v. Eslick, supra, that an oil royalty is an interest in real estate entitling the owner to share in the production of the oil, gas and other minerals therefrom, and that the lease is a conveyance of an interest in the land itself, holding further that portions of the oil produced and paid as royalties represent principal or corpus, and only the interest therefrom, derived from the investment of such funds, should be paid to the life tenant. See also Learned v. Ogden, 80 Miss. 769, 32 So. 278. Since the lease executed by the Trustees for the use and benefit of the life tenants and by the life tenants themselves was beyond the power of those parties to execute, insofar as the Plaintiff herein was concerned, it follows that the only leases under which the Defendant went into possession and drilled the wells were the ratification leases executed by the other co-tenants, which to the extent of 29/30 also ratified and validated the lease that was executed by the Trustees and life tenants, but such leases could not affect the property owned by the Plaintiff.

There is no dispute in the testimony that no wells or minerals of any type had ever been opened up during the lifetime of Mrs. Anna F. C. Martin and, therefore, there were no wells or income from leases or minerals of any type for the Trustees to manage or control. Minerals, as hereinbefore stated, were a part of the corpus of the estate. No rights are given to the Defendant by virtue of the lease that was executed by the Testatrix in 1940 for the primary term of five years, since there were no minerals in production during her lifetime. See the case of Daugherty v. Greene, 67 So.2d 297. It is contended by the Defendant that the Supreme Court of Mississippi, in the case of Martin v.

Eslick, supra, adjudicated that the Trustees owned the oil, gas and other minerals and had the right to execute the lease on behalf of the life tenants. They quote that part of the opinion wherein the Court said:

> "* * * the one-sixth interest in Berkely, devised in trust as aforesaid, and the home property in Pass Christian, is to be held, owned and managed by the Trustees named and their successors in office for the use and benefit of Anna F. B. Martin Eslick for the term of her natural life and at her death for the use and benefit of Frederick Martin Eslick for the term of his natural life, and upon the death of the survivor of said beneficiaries the trust is to terminate and the then corpus is to be delivered to the heirs of Anna F. C. Martin."

This argument is without merit. The Court used the word "owned" in the sense that it was owned under the terms of the will and within the limits of the will during the lifetime of the life tenants. Certainly it was never intended by the Supreme Court of Mississippi to hold that the Trustees owned in fee simple this property, but the only conclusion is that the Court was using the word "owned" in the sense that the Trustees were entitled to the possession and management during the lifetime of these life tenants, subject to the rights of the remaindermen. A reading of the entire judgment and the two opinions will demonstrate clearly that the Supreme Court had in mind only the ownership for the purpose of managing the property for the benefit of the life tenants and subject to the laws of life tenancy in Mississippi.

Trustees under a will have no power to sell the corpus of the estate unless it is specifically given by the terms of the will and nowhere in the will or in either of the decisions of the Supreme Court were the Trustees given the authority to sell or dispose of the corpus of the estate. The Supreme

Court of Mississippi specifically held that the trust estate created by this will was a life estate for the benefit of the life tenants and upon the death of the last one, that the trust would be terminated, and the Court further found that there was no provision in the will specially vesting in the Trustees authority to make repairs or improvements or to sell the property of the trust estate.

Under the leases of the co-tenants of the Plaintiff there can be no question but what the Humble Oil & Refining Company had the right to go into the land and explore, drill, produce and take the oil and gas therefrom. It, in effect, became a co-tenant of the Plaintiff herein, but when one co-tenant develops oil and gas, he is under the duty to account to the others who do not join with him for their pro rata share of the minerals taken from the soil, after deducting the cost of production. There was certainly no active bad faith on the part of the Defendant, nor was the Defendant guilty of any trespass, but it must account to the Plaintiff for the value of the minerals taken, less the cost of production.

The measure of damages was reserved by consent of the parties for determination after a full hearing upon the rights of the parties and it having now been determined that the Plaintiff is entitled to recover a monetary judgment, the Court will reserve jurisdiction for a determination of the damages to which Plaintiff may be entitled.

An order may be drawn in accord herewith.

S. C. Mize.

United States District Judge

APPENDIX "E".

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE WESTERN DIVISION OF THE
SOUTHERN DISTRICT OF MISSISSIPPI.

MABEL W. MARTIN ET AL.,
Plaintiffs,
vs.
HUMBLE OIL & REFINING COMPANY,
Defendant.
} Civil Action Number 806.

Amendment to Findings of Fact.

Upon motion of defendant for Amendment to Findings of Fact set forth in opinion of the Court of June 3, 1960, and for further findings of fact, the Court finds as follows, to-wit:

I.

That the Humble Oil and Refining Company owns an undivided 5/6ths leasehold interest in and to all oil, gas and other minerals in and under the Berkley Plantation property involved in this litigation by virtue of leases granted to it by others than those claiming under the Last Will and Testament of Mrs. Anna F. C. Martin, deceased.

II.

That the first sentence in the last paragraph on page 2 of the opinion complained of in Objections to Opinion and/or Motion for Additional Findings filed for Humble Oil and Refining Company provides that "By virtue of these conveyances the lessee, Humble Oil & Refining Com-

pany, acquired an oil, gas and mineral leasehold on an undivided 29/30 of the Berkley Plantation and the other 1/30 interest was owned by the Plaintiff, Mrs. Mabel W. Martin"; and there should be substituted for the language here quoted the words, "that the Humble Oil & Refining Company acquired a valid and subsisting oil, gas and mineral lease to an undivided 5/6ths of the Berkley Plantation through leases granted it by persons other than those claiming under the Last Will and Testament of Mrs. Anna F. C. Martin, and that there is here involved only an undivided 1/30th interest in the oil, gas and other minerals in and under said Berkley Plantation, which 1/30th is claimed by Mrs. Mabel W. Martin."

III.

That the Objections to Opinion and/or Motion for Additional Findings filed in the above styled and numbered cause by the Humble Oil and Refining Company are in all other respects overruled and the additional relief therein sought is denied.

So ordered on this 29th day of August, A. D., 1960.

/s/ O. C. Mize,
United States District Judge.

A true copy, I hereby certify.

Loryce E. Wharton,
Clerk,
By V. Thompson,
Deputy Clerk.

(Seal)

APPENDIX "F".

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

MABEL W. MARTIN ET AL., Plaintiffs, vs. HUMBLE OIL & REFINING COMPANY, Defendant	Civil Action No. 806.

Judgment.

Came on to be heard the above styled cause on the record of all of the proceedings herein, including the documentary and oral evidence adduced at the several hearings had, and the Court, having received the briefs and heard the oral arguments of counsel and being fully advised in the premises, rendered its opinion which was filed with the Clerk of the Court on June ____, 1960, and which opinion is hereby referred to and made a part hereof. In accordance with said opinion of the Court it is now and hereby ordered and adjudged:

1. That Plaintiffs combined since the death of Eugene Martin in October, 1946, have continuously been, and they are now, the owners of a one-thirtieth (1/30) undivided interest in and to the oil, gas and other minerals in, under or connected with Berkely Plantation located in Adams County, Mississippi, which properties are more particularly described as follows, to-wit:

That certain tract or plantation of land known as "Berkley Plantation" situate about sixteen (16) miles in southeasterly direction from city of Natches, Mississippi, and near the Woodville Road, and bounded as follows, to-wit: On the North by the Beverly Plantation formerly owned by John L. Helm, and a tract of land belonging to Mrs. I. Linsay, and the Overton Plantation of H. C. Buckley, the two latter tracts being formerly the property of Dr. Sanderson, and the East by the Smithland Plantation of S. B. McCaleb (formerly Thorn); on the South by Ellislie Plantation and by Second Creek, and on the West by Second Creek; and containing one thousand three hundred fifty (1,350) acres, more or less, and being the same lands, description of which is set forth in that certain deed from Sanley Carter Shuler to Myra Blake Schuler dated March 29, 1938, recorded in Deed Book 4-W at page 225 of the deed records of Adams County, Mississippi, to which reference is here made for more particular description and deraignment of title.

2. That this undivided 1/30th interest of the Plaintiffs has been and is unleased and that the Defendant, Humble Oil & Refining Company, is due to fully account to the Plaintiffs and to pay Plaintiffs for their 1/30th part of all of the oil, gas or other minerals produced by said Defendant and taken from the aforesaid premises, said accounting to be based on the value of all of such oil, gas and minerals produced by said Defendant less the actual production costs, together with such interest at the legal rate as may be due from the times that such payments should have been made, and all as the Court may later find and order.

3. That pursuant to stipulations of the parties and the order of the Court, jurisdiction is hereby retained to fix and assess the sums due and to be paid by the defendant to the Plaintiffs, which determination will be reached and

order or orders thereon rendered following further hearing(s) to be had.

4. That Plaintiffs are hereby further declared to own and to be entitled to a 1/30th part of the net of all future production of oil, gas or other minerals from said Berkely Plantation (same being 1/30th of the value of that produced less 1/30th of the reasonable and actual costs of producing the same); and the Defendant is hereby, by way of a declaratory judgment, directed to pay said 1/30th of the net of all of such future production from said Berkely Plantation to the Plaintiffs, which payments shall be made at regular monthly intervals.

So Ordered this the 30th day of August, 1960.

/s/ S. C. Mize,
U. S. District Judge.

A true copy, I hereby certify.

Loryce E. Wharton,
Clerk,
/s/ V. Thompson,
Deputy Clerk.

APPENDIX "G".

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE WESTERN DIVISION OF THE
SOUTHERN DISTRICT OF MISSISSIPPI

MABEL W. MARTIN ET AL.,
Plaintiffs,
VS.
HUMBLE OIL & REFINING COMPANY,
Defendant.
} Civil Action Number 809

Judgment or Order.

This cause coming on for further hearing on motion of the defendant again challenging the jurisdiction of the Court in paragraph numbered I of motion here acted upon and claiming through paragraph numbered II of the motion here acted upon that if the Court does have jurisdiction, still the judgment of August 30, 1960, should be set aside and held for naught and judgment entered for the defendant, and the Court being of the opinion that as to that claimed and contended in said paragraphs numbered I and II of the motion here acted upon, same should be overruled and denied; but paragraph numbered III of the motion here acted upon seeks an amendment or addition to the Judgment of August 30, 1960, to make possible an appeal to the United States Circuit Court of Appeals for the 5th Circuit under the authority of Section 1292 of Title 28, United States Code Annotated, and the Court is of the opinion that said motion thereasto should be and it is hereby sustained.

It is, thereupon, the judgment of the Court and ordered that the judgment or order of this Court of August 30, 1960, in the above-styled and numbered cause is not appealable under Section 1292(a), but the Court is of the further opinion that said order of August 30, 1960, copy of which is attached hereto and made a part hereof, involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, and which controlling questions of law have to do with jurisdiction of the Court and the validity of oil, gas and mineral lease held by the Humble Oil & Refining Company as related to and affecting the property here in controversy; and this order to this civil action is entered as an amendment and addition to said order or judgment of August 30, 1960, so that the Court of Appeals may, in its discretion, permit an appeal to be taken from such order if application is made therefor within ten days as provided by said Section 1292(b) of Title 28, United States Code Annotated; and said order or judgment of August 30, 1960, in all other respects shall remain the judgment of the Court.

So Ordered on this 7th day of September, A. D., 1960.

/s/ S. C. Mize,
United States District Judge.

APPENDIX "H".

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18579

HUMBLE OIL & REFINING COMPANY,
Appellant,

versus

MABEL W. MARTIN, ANNIE M. KELLY, SUE KELLY MEE, W. J. VOLLOR, LANDMAN TELLER, JAMES P. BIEDENHARN, L. C. GWINN and R. D. KUEHNLE,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.
(December 29, 1961)

Before CAMERON and WISDOM, Circuit Judges, and THOMAS, District Judge.

CAMERON, Circuit Judge: Appellees Mabel W. Martin, et al,[1] filed this action to recover damages for drainage and waste alleged to have been committed by Humble

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1. The seven appellees other than Mrs. Martin claimed as assignees of undivided interests in any recoveries which might result from this action, the consideration being legal services rendered. Sometimes, Mrs. Martin alone will be referred to as appellee.

to appellees' one-thirtieth undivided interest in a vested remainder in Berkely Plantation on which appellant had drilled a number of oil wells and had captured and removed large quantities of oil. The court below entered judgment in favor of appellee, finding that she was the owner of the one-thirtieth vested interest in Berkely as remainderman, that the trustees under the will of appellee's mother Anna S. C. Martin, who died December 3, 1942, had no power to execute an oil and gas lease to Humble covering appellee's interest; that appellee had never executed any oil and gas lease or other conveyance to Humble; and that appellee was entitled to recover the value of one-thirtieth of the oil removed by Humble in the past and that to be removed in the future less the actual production cost. By stipulation of the parties the court retained jurisdiction to fix the amount of damages due appellee.

The court below wrote an excellent opinion, now published in ..... F. Supp. ....., and we adopt this opinion as expressive of the views of this Court on the issues raised before the court below and repeated before us. Many of the questions of law and fact presented to the court below had been decided by the Supreme Court of Mississippi in the case of *Martin et al.* v. *Anna F. B. Eslick et al.*, 90 So.2d 635, 92 So.2d 244, this being a suit for construction of the will of Mrs. Anna F. C. Martin brought by the executor-trustee to which all interested persons became parties. The facts are fully set forth in this decision by the Supreme Court of Mississippi, and reference is made to it and to the opinion of the court below for the facts. We will not repeat them, except as they are necessary in the consideration of the points relied upon by Humble which we shall discuss.

At the threshold lies the question arising from appellant's contention that the court below was without juris-

diction by reason of the absence of indispensable parties whose presence would destroy diversity jurisdiction. Appellee Mabel W. Martin was and is a citizen of the State of Florida, and appellant a corporation under the laws of the State of Texas. Appellant claims that by will, Anna F. C. Martin devised to her daughter Mrs. Anna F. B. Eslick and upon her death to her son Frederick Martin Eslick a life estate in Berkely, which interest the testatrix directed be held and managed by her trustees for these life tenants with the remainder to her direct heirs. The corpus of the estate, under the order of the Supreme Court in *Martin* v. *Eslick, supra,* vested as of the date of her death in the children of the testatrix, of which appellee Mabel is one. Appellant claims that the two life tenants and the remainderman other than appellee, all residents of Mississippi, are indispensable parties whose presence would destroy diversity jurisdiction inasmuch as the appellees other than Mabel W. Martin are residents of Mississippi. Appellees insist that said parties are not indispensable, because appellees are asserting no claim against the life tenants or the other remaindermen, but are seeking to recover nothing but a money judgment against Humble, their co-tenant, for the net value of the oil removed by Humble from the one-thirtieth interest in said oil which vested in Mabel W. Martin upon the death of the testatrix.[2]

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2. The appellant admits in its brief that such is the sole claim of appellees:

> "The plaintiffs claim that they are entitled to the damages for waste based upon 1/30th of the value of oil, gas and other minerals produced or to be produced by the defendant from the lands in question and identified as of value in excess of $100,000 (R. 8). The prayer is for an accounting, for a declaratory judgment requiring the payment to the plaintiffs at reasonable intervals 1/30th of the market value of all oil, gas and minerals produced from the lands after the date of the judgment (R. 9)."

Under Mississippi law, as declared in *Martin* v. *Eslick*, *supra*, and the cases cited by the lower court in its opinion, oil in place is real property and title to all of the mineral interests of the testatrix in Berkely vested, as of the time of her death, in the remaindermen; and the holders of the life estate and the trustees for them had no interest in the royalties arising from Humble's production of oil from the lands in question beyond any income which might be derived from the investment of this royalty income by the trustees. It was undisputed, and the court below found, that the holders of the life estate, the trustees and all of the remaindermen except appellee Mabel Martin, had excuted oil and gas leases to Humble; but that Mabel Martin had never given Humble any lease or other conveyance covering her one-thirtieth interest in these minerals but had specifically refused to do so.

The court below was correct in holding, therefore, that this controversy was solely between appellees and Humble and that appellees were not claiming anything at all against the life tenants or the remaindermen who had conveyed their mineral interests to Humble. All concede that Humble had the right to produce oil and gas from Berkely subject to its duty to account to Mable Martin and her assignees for the portion of the minerals owned by them.

The court below discussed the Mississippi cases laying down the rule that the life tenants and the other remaindermen were not indispensable parties to this action. It was right and proper that this be done, because the character of the ownership by the parties of the minerals involved is determined by Mississippi law. The trial court also adverted, in passing, to some of the cases decided by this Court on the question of indispensable parties. We think it would be helpful if we would amplify that aspect of the

problem by listing additional cases by this Court on the subject inasmuch as this is basically a federal question, 3 Moore's Federal Practice, pp. 2152-2153.

In the case of *Lige Estes* v. *Shell Oil Co.*, 1956, 234 F.2d 847, we analyzed a number of Fifth Circuit cases and, based upon them, reversed the judgment of the lower court granting a motion to dismiss for absence of indispensable parties. The case there was much stronger in favor of holding the absent parties indispensable than is this one. Estes claimed to own an interest in lands from which Shell had been, for many years, producing oil, refusing to account to him for his portion of the production. In its motion to dismiss and the affidavits attached thereto, Shell showed that there were many asserted owners of mineral and royalty interests in the land who were not joined as defendants with Shell, some of whom were residents of the same State as Estes. It was not disputed that their claims of ownership of the mineral interests involved did clash with those of Estes—a claim not made here. But we held that the trial court should hear the case brought by Estes and so mold its decree as to grant him whatever relief the facts might show him to be entitled to, while at the same time protecting the interests of the parties not before the court. We distilled the rule from the other cases mentioned and stated it in general terms (234 F.2d 852):

> "It [Shell] would like to have before the court all parties to whom it conceives it may be called upon to answer if plaintiff is successful; or to have the action dismissed because that cannot be done without destroying diversity jurisdiction. It does not lie with a defendant so to take hold of plaintiff's litigation and conduct it according to defendant's ideas and to suit its purposes. The choice of a forum belongs primarily to a plaintiff and it is our duty to sustain a chosen jurisdiction unless there is some legal reason why this

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should not be done. Certainly no valid reason has been brought forward here.

> "It is clear that the complaint sets forth facts and prays for relief touching a controversy between plaintiff and defendant with respect to which the others mentioned are not shown by proof to be indispensable. . . ."

The whole question of indispensable parties in actions involving oil royalties and the land from which the oil had been taken was exhaustively discussed by Judge Sibley in his opinion in *Hudson et al.* v. *Newell et al.*, 1949, 172 F.2d 848. The Hudsons, citizens of Texas and Louisiana, asserted that they were the owners of a large body of land in Mississippi on which oil had been found. They brought four actions against residents of Mississippi who were claiming to own the fee and against some of their royalty assignees. Gulf Refining Company was the lessee of the oil, gas and mineral rights by conveyances from all of the individual parties sued. The Hudsons sought by their actions to cancel all of the conveyances, including those supporting the title of the parties claimed to be indispensable whose presence would destroy diversity jurisdiction. This Court held that such actions could not be maintained as against those parties on the ground that no action to cancel a cloud upon title to real estate could be maintained unless all claiming to own an interest therein were made parties defendant to the action.

But we there reversed a ruling of the court below dismissing the entire bill of complaint, because we held that the action for a money judgment against Gulf Refining Company, mineral lessee of all of those mentioned in the last paragraph, for the value of the oil extracted from these lands, was maintainable. We discussed a large number of cases including many from this Court and based the deci-

sion upon them, holding that there was no conflict between them and the cases relied upon by appellant here.

This Court considered many decisions from this Circuit arising in Mississippi and relied upon by both litigants here as well as cases from the Supreme Court of the United States, in the recent decision of *Mackintosh* v. *Marks' Estate*, 225 F.2d 211, involving Louisiana mineral interests. We quote some unconnected excerpts from pages 214-215 of this opinion:

> "Plaintiffs are entitled to any relief which the facts justify even though that relief has not been asked and that theory has not been advanced in the pleadings . . .
>
> "It was said by this Court in Seeley v. Cornell, 5 Cir., 74 F.2d 353, 356: 'It is within the powers of a court of equity to deprive a party of the benefit of a deed or judgment obtained by fraud without their being set aside.' The power of a court of equity so to mold its decree as to do complete justice between the parties without adversely affecting those not before the court is exceedingly broad and elastic.
>
> "We hold that the district court erred in requiring all persons having or claiming any interest in the lands to be made parties, and in dismissing the suit upon plaintiffs' failure to join those whose joinder would have defeated the jurisdiction of the court. Instead, the court should retain jurisdiction and limit any relief granted to such as can be given without prejudice to the absent parties."

And see *Bowdoin* v. *Malone*, 5 Cir., 287 F.2d 282, 285-286.[3]

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3. In both Hudson and Mackintosh we distinguished a number of the same cases appellant relies on here, e.g., Keegan v. Humble, 5 Cir., 155 F.2d 971, and Calcote v. T. P. C. & O. Co., 5 Cir., 157 F.2d 216.

Applying briefly the foregoing principles to the specific contentions of appellant here, it is plain that: appellee has owned since December 3, 1942 an undivided mineral interest in Berkely; that Humble endeavored to induce appellee to sell to it a lease on said interest and that appellee refused; that Humble has produced large quantities of oil from the lands in which appellee owned an interest and has failed to account to her for her portion of the oil extracted; and that this action is entirely between her and Humble for such an accounting. It is further plain that the other remaindermen will not be affected adversely or at all by the relief sought by appellee and that granted by the court, as the complaint and the judgment relate solely to appellee's interest.

As to the life tenants and their trustees, they have never owned any part of the oil underlying Berkely or that removed from it, and they have had no interest in the oil operations except as they might interfere with the life tenant's use of the surface. That use is not involved in what appellee sought in this action against Humble and what the court below adjudicated. Additionally, the life tenants and their trustees had executed a lease to Humble fixing their rights as against Humble. Nor was the right of the life tenants and their trustees to collect interest from the investment of any royalty money which might accrue from the leases then outstanding involved in the action before us.[4]

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4. Appellant stresses the provision in the order entered by the Supreme Court of Mississippi:

> "... the said trustee J. Gaillard Martin who has survived his brother, Francis C. Martin, is empowered and directed to collect any royalties *payable under said oil, gas and mineral leases* as such trustee; and subject to the approval of the Chancery Court of Harrison County, Mississippi, he is hereby authorized to reinvest said funds and to pay the interest derived from the investment of said funds to the beneficiaries under said trust." [Emphasis added.]

This order of the Supreme Court of Mississippi covered only royalties arising from leases which had been given by the trustee, the life tenants, and all of the remaindermen except appellee. The order did not cover or purport to cover the interest of appellee, which alone is dealt with in the judgment now before us, based upon appellee's claim against Humble for waste. Any rights the life tenant or the trustee may have against appellee growing out of their relationship with appellee remain unimpaired and unaffected by the judgment entered by the court below. We are not passing upon the question whether any rights do or do not exist in favor of the trustee and the life tenants against the appellee. We merely say that the judgment before us does not affect those rights in any way.

Appellee contends that she stands in a different position from the other remaindermen who joined with the life tenants and their trustees in giving or confirming an oil lease to Humble; that by so doing, they confirmed the right of the trustees to receive from Humble the royalties arising from the interests of the consenting remaindermen.

She contends further that all of the questions now raised by appellants could have been brought before the court below if those parties asserted by Humble to be indispensable had entered their appearances and asserted their claims in the course of the trial by the lower court, or if Humble had brought them in as parties to the action. Rules 14, 19 (b) and 24, F.R.C.P. She argues further that the record shows that the trustees, the life tenants and the other remaindermen were available to Humble, as it was able to procure their attendance as witnesses as well as to obtain affidavits from them. We do not reach this question, as it was not presented to or passed upon by the court below.

Under the foregoing facts and authorities, it is clear that the court below did have jurisdiction to entertain the

complaint appellee brought before it and to enter judgment thereon.

It remains but to consider whether the court below erred in holding that the executors-trustees under the will of the testatrix, acting without order of the Chancery Court, were without power to execute to Humble an oil, gas and mineral lease which would prejudice or affect in any way appellee's rights with respect to her undivided one-thirtieth interest; and that appellee was entitled to maintain this action for waste against Humble. We do not think that the court erred in so doing.

That portion of the opinion, written by the able district judge, who has practiced law in Mississippi all of his years before going on the bench, is a sufficient exposition of the rationale of the holding. The authorities cited by him are ample to sustain it. We would add but a few words to what the court below so well expressed.

The following quotation taken from the section of American Jurisprudence referred to by this Court in *Crabb et al.* v. *Commissioner of Internal Revenue,* 121 F.2d 1015, 1016, combined with a portion of §300 of the same text state succinctly the principles which were relied upon by the court below:

> "It is well settled that legal life tenants, whether the owners of conventional estates created by act of the parties or the owners of life estates arising by operation of law, as well as equitable life beneficiaries of trusts, have no right to open and work, or have operated for their benefit, mines or mineral deposits which constitute unopened mines in legal contemplation, because such conduct would be a lasting injury to the inheritance. This rule is applicable not only to metals, metallic ores, and coal, but also to oil and gas . . . [33 Am. Jur., Life Estates, Remainders, Etc., §328]

"The general rules as to the relative rights of life tenants and remaindermen in solid minerals have been stated in many cases to apply to minerals of fugitive natures such as oil and gas. It is established, practically without dispute, that a life tenant has no right to exploit the gas and oil resources of the property for his own benefit, or to authorize, by lease or otherwise, another to do so, where such exploitation had not been begun or authorized before the commencement of the life estate . . . As the rule is sometimes expressed, the life tenant has no right to open new wells where none had been opened or authorized before the commencement of the life estate. The fact that possibly, by the operations upon neighboring lands, all the gas will be taken before the remaindermen come into possession, cannot affect their right to prevent the taking by the lessee or grantee of the life tenant. Authority to take gas and oil from the property, where no wells were opened at the time of the creation of the trust, cannot be conferred upon the life tenant by a trustee empowered to manage, lease, and control the property, for the purpose of paying for necessary repairs, taxes, and expenses, the net annual proceeds to be paid to the life tenant. The remaindermen may recover damages in an action of waste against one who is a grantee of only the life tenant, and may enjoin conduct on the part of a lessee from the life tenant alone . . ." [Ib. §330, pp. 834-835.][5]

We do not find that appellant has brought forward any convincing authority contrary to these principles. Indeed it is clear that Mississippi is aligned with them and that no authority can be found holding that under its laws, the trustee for a life tenant can make an oil lease the effect of which is to convey oil in place and confer upon the lessee the right to remove the same. It is further clear, as held

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5. These principles are supported by the cases collected in an annotation in 18 ALR 2d 100, p. 115, et seq.

by the court below, that the rights already exercised by Humble to remove oil from Berkely derive from the leases given by the remaindermen other than appellee. Nothing in the instruments executed by the testatrix or in the decision of *Martin* v. *Eslick, supra,* casts any doubt upon the holding of the court below, which with these few additional comments, we accept and affirm.

Being of the opinion that the court below had jurisdiction to try the issues dealt with in its opinion and judgment, and that the holding made by it and the reasons given are consonant with the Mississippi law applied to the facts of this case, its judgment is affirmed, and the cause is remanded, as stipulated by the parties, for determination of the damages.

AFFIRMED AND REMANDED.

THOMAS, District Judge: I dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ Clara R. James,
(Seal) Deputy.

New Orleans, Louisiana, May 11, 1962.

APPENDIX "I".

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18579.

HUMBLE OIL & REFINING COMPANY
Appellant,

versus

MABEL W. MARTIN, ANNIE M. KELLY, SUE KELLY MEE, W. J. VOLLOR, LANDMAN TELLER, JAMES P. BIEDENHARN, L. C. GWIN and R. K. KUEHNLE,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.
(April 27, 1962)

On Petition for Rehearing.

Before CAMERON and WISDOM, Circuit Judges, and THOMAS, District Judge.

PER CURIAM: Upon considering appellant's petition for rehearing and its amendment to or supplemental petition for rehearing and the briefs submitted with them, it is ordered and decreed that said petitions for rehearing, and each of them, are hereby

DENIED.

THOMAS, District Judge, Dissenting:

I am of the opinion there are absent indispensable parties. This would deprive this court of jurisdiction and leave the matter up to the Supreme Court of Mississippi, which I believe is the proper tribunal to decide this Mississippi question. Therefore I respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ Clara R. James,
(Seal) Deputy.

New Orleans, Louisiana, May 11, 1962.

APPENDIX "J":

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,201

J. Gailliard Martin, Executor of the Last Will and Testament of Anna F. C. Martin, et al.

v.

Mabel W. Quisenberry Martin Campbell

Holmes, Justice.

This appeal involves the construction of the last will and testament of Mrs. Anna F. C. Martin, deceased. The decedent died on December 3, 1942. On January 2, 1943, there was admitted to probate in common form in the Chancery Court of Harrison County five certain instruments of writing, purporting to be the last will and testament of the decedent. These instruments were wholly written and subscribed by the decedent in her own hand writing and are as follows:

"Know all men by these presents I Anna F. C. Martin of the town of Pass Christian, Harrison County, State of Mississippi, being of sound and disposing mind, memory and understanding, do hereby make and declare, this to be my last will and testament made by me. I direct all my just debts, including my funeral expense and those of my last illness and the expense of the administration of my estate, to be paid by my Executors and Trustees, hereinafter named, out of the first money coming into their hands and available therefor.

"I hereby nominate, constitute and appoint my three sons, Benson B. Martin, Gailliard, Francis C. Martin, Executors of my last will and testament.

"(Signed) Anna F. C. Martin

2.

"And I especially direct that they the said Benson B. Martin, Gailliard, Francis C. Martin shall not be required to render any account to any court of their acts as such Executors and Trustees, and not required to give any bond. I hereby make my sons Benson B. Martin, Gailliard and Francis C. Martin my trustees to hold and manage the interest of my daughter Anna F. C. Eslick, in the event of her death they to continue as trustees for son and grandson, Frederick Martin Eslick. They Benson B. Martin, Gailliard and Francis C. Martin Trustees without Bond or reporting to any court. They or either one to name and appoint successors they know who would be agreeable to me.

"Should Frederick Martin Eslick survive, outlive, his mother, Anna F. B. Martin Eslick and dying without children, the interest then to go to my direct blood heirs.

"(Signed) Anna F. C. Martin

3.

"Benson B. Martin having received before this writing liberally from his Father and me. Eugene Martin and J. Gailliard Martin and Francis C. Martin and Anna F. B. Martin Eslick to share equally in my interest in Blakely Redwood interest. Anna F. B. Martin Eslick to have my interest in Berkely, also the Pass Christian property, or if sold, what was invested therefrom. I have above stated Benson B. Martin, Gailliard and Francis C. Martin to be Executors and Trustees without bond nor required to ac-

count to any court. My small property all located in Mississippi State I feel will be justly disposed according to my wishes, already expressed. Anna F. B. Martin Eslick to have my personal property giving her Brothers as she sees fit.

(Signed) Anna F. C. Martin

"This day A.D. 1933

March 24, 1933

Codile to my will of March 24, 1933

"I leave the disposal portion of all real estate in Louisiana to my daughter, Anna and require son, Benson, to collect the advances previously made him against his legitime therein.

"Written, dated and signed by me at Pass Christian, Miss., October 27, 1936.

(Signed) Anna F. C. Martin

"This day June 8, 1936 A.D.

"I write this my last will and testament, my will previous written will give some details. Not a cent of my little property personal and real can be inherited by either Anna or Frederick Martin Eslick until five (5) years after Major Frederick Murphy Eslick has been dead.

"I solemnly command my sons Benson, Eugene, Gailliard and Francis, also my sister Caroline Ferguson Blake to carry out my commands.

(Signed) Anna F. C. Martin

"Pass Christian, Miss.
June 8, 1936

"June 8, 1939

"Know all here by these presents, I Anna F. C. Martin of the town of Pass Christian, Harrison County, State of Mississippi. Being of sound and disposing mind, memory, and understanding do hereby make and declare this my last will and testament made by me.

"I direct all my just debts, including my funeral expenses, and those of my last illness and the expenses of the administration of my estate to be paid by my Executors and Trustees hereinafter named out of first money coming into their hands and administer therefor. I hereby nominate, constitute and appoint my three sons, Benson B. Martin, J. Gailliard Martin, Francis C. Martin, Executors of my last will and testament. I expressly direct that they the said Benson B. Martin, J. Gailliard Martin and Francis C. Martin that they should not be required to render any account of their acts to any Court as such Executors and Trustees and not required to give any Bond. They to hold and manage the interest of my daughter, Anna F. B. Eslick in event of her death they to continue Trustees for Frederick Martin Eslick, in event of his death to be inherited by my immediate heirs. The division of my small property in Louisiana and Mississippi the details of which division I have given my Executors elsewhere.

"(Signed) Anna F. C. Martin

"Pass Christian, Miss.
May 4, 1942

"In leaving to my son Eugene Martin 1/4 one fourth of my interest in Redwood Plantation. It is to be understood he does not convey it, in any manner, away from my

blood—that is to no one out or away to any one, unless to one of his brothers Gailliard or Francis Martin or his sister Anna F. M. Eslick or her son Frederick Martin Eslick. I feel I have this legal right—having in many ways given him and expended on him, many and other benefits.

"(Signed) Anna F. C. Martin"

Letters testamentary were duly issued to J. Gailliard Martin and Francis C. Martin, who were the then surviving executors named in the will, the other named executor, Benson B. Martin, having predeceased the decedent on March 9, 1941.

No proceeding to contest the validity of the will was filed and any such proceeding is now barred by the limitation of two years after probate without notice prescribed by Section 505 of the Mississippi Code of 1942. Francis C. Martin, one of the executors named in the will, died on June 25, 1945, and J. Gailliard Martin became the sole surviving executor and trustee in the will.

On April 4, 1949, more than six years after the probate of the will, J. Gailliard Martin, individually and as executor of the estate of the decedent, and as testamentary trustee for Anna F. B. Martin Eslick, filed his petition in the Chancery Court of Harrison County, seeking a construction of the will and instructions as to his duties and authority as testamentary trustee. All parties interested were made or became parties to the proceedings. After a hearing on September 20, 1949, and after taking the case under advisement, the chancellor, on August 4, 1955, rendered and entered his final decree construing the will of the decedent. From this decree all parties have appealed except Anna F. B. Martin Eslick and her son, Frederick Martin Eslick, who are the appellees here.

The facts as disclosed by the testimony and the admissions in the pleadings are not in dispute. The testatrix, at the time of her death, was about 89 or 90 years of age, and was a widow, her husband, Eugene Martin, Sr., having died in the year 1915. At the time of the execution of the instruments comprising her will, she was fully capable of transacting her own affairs and of determining and making a reasonable disposition of her property. She had four sons, namely: Benson, Francis C., Eugene and J. Guilliard, and one daughter, Anna F. B. Martin, all of whom were living at the time of the death of the testatrix except Benson, who died intestate prior to the death of his mother. Francis C. died subsequent to his mother's death and left a last will and testament whereby his estate was devised and bequeathed to his sister, Anna F. B. Martin Eslick and Mrs. Helen Pugh Lewis. All of the sons were self-supporting with the exception of Eugene, who appeared unable to obtain employment, and he lived with and was wholly dependent upon his mother. The daughter, Anna F. B. Martin, lived with her mother in Pass Christian, Mississippi, until her marriage to Major Frederick Murphy Eslick in about the year 1926, at which time she was 35 years of age. After their marriage Mayor and Mrs. Eslick moved to Savannah, Georgia, where they resided for a while, and later returned to Pass Christian to make their home with the testatrix. Major and Mrs. Eslick had one son, Frederick Martin Eslick. Major Eslick was a retired Marine officer who received a pension of about $243.00 per month. He is still living.

Eugene Martin accompanied his mother each summer to Hendersonville, North Carolina, and on the occasion of one of these visits he met Mrs. Mabel W. Quisenberry, a widow, whom he later married on November 14, 1942. He was then 65 years of age. He died on October 4, 1946.

His sole heir and the sole beneficiary of his will is his widow, Mrs. Mabel W. Martin, who is one of the appellants here. His widow later married a man named Campbell.

Benson Martin, who died intestate prior to the death of the testatrix, left surviving him as his sole heirs at law his son Benson, Jr., and his daughter, Mary Frances Martin Dent, who are also appellants here, and under Section 660 of the Mississippi Code of 1942, succeed to the share of their father in the estate of the testatrix. At the time of the death of the testatrix she was living in her home at Pass Christian, Mississippi. At that time she owned a plantation in Warren County, Mississippi, known as Redwood No. 2, and an undivided 1/6 interest in a plantation in Adams County, Mississippi, known as Berkely Plantation and located within the area of the LaGrange Oil and Gas Field, a two-story, nine room residence at Pass Christian, two small Negro tenant houses in New Orleans, Louisiana, and some personal property of small value. Her entire estate, both real and personal, was estimated to be of the total value of $60,000.

In construing the will of the testatrix, the chancellor held that the instrument dated June 8, 1936, providing that neither Anna nor her son, Frederick Martin Eslick, could inherit until five years after the death of Major Frederick Eslick, was contradictory to the remainder of the instruments admitted to probate and was, therefore, null and of no effect, and that the remaining instruments constituted the last will and testament of the testatrix. The chancellor further held that under the remaining instruments the devise to Eugene Martin of a one-fourth interest in Redwood Plantation in the instrument dated March 24, 1933, was later effectively restricted by the instrument dated May 4, 1942, and was thereby reduced to a life estate with remainder to the heirs of the testatrix as of the date of her

death. The chancellor further held that the devise to Mrs. Eslick of a one-fourth interest in Redwood Plantation and a one-sixth interest in Berkely Plantation was a devise to the testamentary trustees for the use and benefit of Mrs. Eslick for the term of her natural life, and upon her death, to said trustees for the use and benefit of Frederick Martin Eslick for the term of his natural life, with remainder in the heirs at law of the testatrix in the event the said Frederick Martin Eslick should survive his mother and die without children, or with remainder in the heirs at law of the said Frederick Martin Eslick in the event he should survive his mother and die leaving issue. The chancellor further held that Mrs. Eslick acquired under the will a fee simple title to the residence property in Pass Christian, and to the New Orleans property, and to the personal property of the decedent.

The chancellor further held that during the existence of the trust created by the will the beneficiary of the trust should be paid the income from the trust property, including all oil and gas rents and royalties collected, less reasonable expenses incurred in the management by the trustee.

The appellant, J. Gailliard Martin, individually and in his representative capacity, contends that the court erred in holding that any part of the property of the testatrix vested in fee simple in Mrs. Eslick. We think this contention is sound except as to the personal property and the Louisiana property.

It is of course a well settled rule that in construing a will the prime inquiry is the intention of the testator. Cross v. O'Cavanagh, 198 Miss. 137, 21 So.2d 473; Broomfield v. Englesing, 202 Miss. 62, 30 So.2d 514; In re Raworth's Estate, 211 Miss. 780, 52 So.2d 661; In the Matter of the Will of Kelly Vail, 87 So.2d 68.

In the instrument dated March 24, 1933, it was provided that the trustees therein named were to hold and manage the interest (emphasis ours) of Mrs. Eslick, and in the event of her death to continue as trustee for her son. We think it is manifest that the testatrix intended that the interest (emphasis ours) here referred to meant the entire interest provided for Mrs. Eslick under the instrument as a whole, unless a contrary intention should appear from the instrument itself. The only contrary intention appearing in the instrument is that with reference to the personal property. The testatrix provided that Mrs. Eslick was to have the personal property, "giving her brothers as she sees fit." It is readily apparent that the testatrix meant by this language that Mrs. Eslick should have the personal property, and that she might dispose of it to her brothers or keep it as she determined. We are of the opinion, therefore, that the testatrix vested the full title to the personal property in Mrs. Eslick. Nothing of a contrary intention appears in the instrument dated March 24, 1933, or in any of the other instruments. The chancellor so held, and we think he was correct.

We are of the opinion, however, that the chancellor was in error in holding that the home in Pass Christian was devised to Mrs. Eslick in fee simple. That property was a part of the interest (emphasis ours) devised to Mrs. Eslick by the instrument dated March 24, 1933, and was included in the trust estate and nothing of a contrary intention appears in any of the instruments.

The instrument dated March 24, 1933, did not deal with the Louisiana property but dealt only with the personal property of the testatrix and the real estate of the testatrix in Mississippi. By a separate and subsequent instrument dated October 27, 1936, the testatrix devised the Louisiana property to Mrs. Eslick in fee simple and

nothing in this instrument is repugnant to any of the other instruments. Since there is no language in this instrument indicating an intention to the contrary, the disposition of the Louisiana property by the testatrix in this document is controlled by the Laws of the State of Mississippi. See Palmer et al. v. Crews, 203 Miss. 806, 35 So.2d 430, wherein the Court held that a will is to be construed according to the laws of the domicile of the testator as to the disposition of property in another state unless it is clear from the instrument itself that he intended the laws of the other state to control. We conclude that Mrs. Eslick acquired the fee simple title to the Louisiana property. The chancellor so held and we think he was correct.

The appellant, J. Gailliard Martin, further contends that the chancellor erred in holding that the beneficiary of the trust is entitled to receive oil royalties derived from the trust property. The immediate question presented is as to the right of Mrs. Eslick during her life to be paid the royalties derived from the oil lease on Berkely Plantation. The chancellor decreed that during the existence of the trust the beneficiary, who at present is Mrs. Eslick for the term of her life, should be paid these royalties. We think the chancellor was in error in so holding. It is clear from the record that the oil lease from which the royalties are being derived was executed subsequent to the death of the testatrix. We held in Palmer et al. v. Crews, supra, that an oil royalty is an interest in real estate entitling the owner to share in the production of oil, gas or other minerals therefrom. We also held in Dougherty v. Greene et al., 218 Miss. 250, 67 So.2d 297, that the interest conveyed by a mineral lease is a determinable fee and that the royalties payable under such lease is an interest in the land itself. It is manifest to us that the oil in place is a part of the real estate and can not be withdrawn without injury

to the inheritance, and that, therefore, portions of the oil produced and paid as royalties represent principal or corpus and only the interest thereon derived from any investment of such funds should be paid to the life tenant. Analogous to the question is the right of the tenant to cut for profit and remove timber on the leased premises. In the case of Bernard v. Board of Supervisors of Jackson County, 216 Miss. 387, 67 So.2d 576, the Court held that the cutting of timber by the tenant for commercial purposes constituted waste and an injury to the inheritance, and that no right vested in the tenant to do so or to receive the proceeds of the timber so cut. We think the question, however, has been disposed of adversely to the life tenant by this Court in the case of Pace v. State ex rel. Rice, 191 Miss. 780, 4 So.2d 270, wherein it was held that a life tenant has no interest in or right to open and work new mines not in operation at the time the life estate vests, since to do so would amount to the commission of waste as a lasting injury to the inheritance. See also 31 C.J.S., Estates, Section 42, p. 49. It is our opinion that the chancellor was in error in holding that the life tenant under the trust is entitled to be paid the royalties of the oil lease on the interest in Berkely Plantation. The beneficiary of the trust vested with a life estate is entitled only to the interest derived from any investment of funds paid as oil royalties.

The appellant, Mrs. Mabel W. Martin (Campbell) contends that Mrs. Anna F. C. Martin died intestate and that as the sole heir at law of her husband, Eugene Martin, who died subsequent to the death of his mother, she is entitled to succeed to her deceased husband's share in the estate of his mother, such share to be determined according to the laws of descent and distribution. She further contends that if mistaken in the foregoing contention, then in any event she is vested with the one-fourth interest in Redwood Plantation devised to her husband, Eugene Martin, for the rea-

son that the restriction as to alienation placed on her husband by the instrument dated May 4, 1942, was repugnant to the estate originally created for her husband, and was against public policy and void, and that, therefore, her husband was at the time of his death vested with a fee simple title to said one-fourth interest in Redwood Plantation.

In addressing ourselves to the said appellant's first contention, it is to be borne in mind that it is a well established rule that a will is to be construed so as to avoid intestacy if that can be reasonably done considering the language employed in the instrument and the circumstances confronting the testator at the time. Palmer, et al v. Crews, supra.

The appellant bases her contention upon her interpretation of the instrument dated June 8, 1939, and the instrument dated May 4, 1942. She concedes that the instrument dated June 8, 1939, was properly admitted to probate since it named and nominated executors, notwithstanding the fact that it made no disposition of property. Crawford's Estate v. Crawford, 82 So.2d 823. She argues, however, that the instrument dated June 8, 1939, was an entire new will and that it revoked all prior wills and codicils and that since it made no disposition of property, the testatrix should be adjudged to have died intestate and this appellant should be adjudged to have succeeded to the share of her deceased husband as an heir at law of his mother's estate. We are of the opinion that this argument is not well founded. We think that the statement of the testatrix contained in the said instrument of June 8, 1939, to the effect that she had theretofore given to her executors elsewhere the details of the division of her property in Louisiana and Mississippi had reference to the details contained in the prior instruments of a testamentary nature and clearly indicates that

she was not revoking the original instrument dated March 24, 1933, providing for the disposition of her property in Mississippi, or the instrument dated October 27, 1936, devising to her daughter, Mrs. Eslick, the Louisiana property. More convincing of this conclusion is the statement of the testatrix in the instrument dated May 4, 1942, wherein she used the language: "In leaving to my son Eugene 1/4 one-fourth of my estate in Redwood Plantation . . .." Nowhere in any of the other instruments had she left to her son Eugene a one-fourth interest in Redwood except in the instrument dated March 24, 1933. We have no difficulty in concluding that the said instrument dated June 8, 1939, did not and was not intended by the testatrix to wholly revoke and annul all prior testamentary dispositions of her property made in prior instruments, and that, therefore, she did not die intestate. We are of the opinion and hold, however, that said instrument of June 8, 1939, by implication revoked or modified the provision in the prior instrument of March 24, 1933, with reference to the vesting of the remainder interest upon the death of Frederick Martin Eslick. In the instrument dated March 24, 1933, it was provided that the trustees hold and manage the interest of Mrs. Eslick, and in the event of her death continue as trustees for Mrs. Eslick's son, Frederick, and that in the event Frederick should survive his mother and die without children (emphasis ours) then the interest was to go to the direct heirs of the testatrix. This condition with reference to Frederick's death without children was eliminated in the subsequent instrument dated June 8, 1939, wherein it was provided that upon the death of Frederick the remainder interest should vest in the direct heirs of the testatrix. Thus it is apparent that the testatrix intended as to the provision made for Frederick that upon the death of Frederick, the remainder interest should vest in the direct heirs of the testatrix, whether Frederick died with or with-

out children. The chancellor held that such condition attached to the vesting of the remainder interest, and as to this, we think he was in error.

We are further of the opinion and hold that by implication, the instruments of October 27, 1936, and June 8, 1939, revoked the instrument of June 8, 1936, providing that Mrs. Eslick and her son should not inherit any of her property until five years after the death of Major Eslick. In the instrument dated October 27, 1936, the testatrix devised her Louisiana property without provision for the postponement of the enjoyment thereof. In the instrument dated June 8, 1939, the testatrix directed the management by trustees of the interest of Mrs. Eslick and her son, without any provision for the postponement of the enjoyment thereof. Regardless of what may have actuated the testatrix at the time to make the provisions contained in the instrument of June 8, 1936, we are of the opinion that the testatrix intended to revoke, and did revoke, such provisions by the two subsequent instruments above referred to.

We come now to the contention of Mrs. Mabel W. Martin (Campbell) that in any event she is vested with the one-fourth interest in Redwood Plantation devised to her husband, Eugene Martin. This contention presents for our determination and decision the validity vel non and effect of the restraint as to alienation placed upon Eugene Martin by the provisions of the instrument dated May 4, 1942. We repeat here for immediate consideration the language of this instrument.

"In leaving to my son Eugene Martin 1/4 one fourth of my estate in Redwood Plantation. It is to be understood he, does not convey it, any manner, away from my blood—that is to no one out or away to any one—unless to one of his brother Gaillard or Francis Martin or his sister Anna F.M. Eslick or her son Frederick Martin Eslick.

"I fell I have this legal right—having in many ways given him and expended on him, many and other benefits."

The chancellor held that the devise to Eugene Martin of a one-fourth interest in Redwood Plantation in the instrument dated March 24, 1933, was later effectively restricted by the instrument dated May 4, 1942, and was thereby reduced to a life estate with remainder to the heirs of the testatrix as of the date of her death. We are unable to agree with the chancellor's conclusion. The appellant argues that the attempted restrictions upon alienation are repugnant to the original estate created and are insufficient to reduce such estate to a life estate, and that, therefore, the fee simple title to a one-fourth interest in Redwood was vested in Eugene Martin at the time of his death, and that the same passed to his sole heir, Mrs. Mabel W. Martin (Campbell). We think this argument is sound.

It will be observed that the instrument in question makes no provision for the reversion of the title in the event Eugene Martin in his lifetime violates the restrictions or makes no conveyance whatever of the property. There are also well recognized rules of construction to be borne in mind in solving the question presented. Courts in construing wills do not favor the creation of life tenancies. In Re Raworth's Estate, 211 Miss. 780, 52 So. 2d 661. The law favors the vesting of estates created by will at the earliest possible moment. In Re Raworth's Estate, supra. An absolute devise may not be reduced to a life estate by any succeeding language which is inferior in clarity or certainty in the devising estate. In Re Vail's Will, 87 So. 2d 68.

In the cases of Crawford, et al v. Solomon, 131 Miss. 792, 95 So. 686, and Bratton v. Graham, 146 Miss. 246, 111 So. 353, this Court has recognized the validity of partial restraints on alienations. Those cases, however, dealt with instruments containing reversionary clauses. The opin-

ion in the case of Fowlkes v. Wagoner (Tenn.), 46 So. 590, quotes Professor Freeman's note to DePeyster v. Michael, 57 Am. Dec. at page 496, as follows: "It may be laid down as a general rule that unless there is a reversion or limitation over to secure obedience to a prohibition to alienation, it is wholly nugatory."

Aside from the general rule quoted, however, we do not think that the language of the restraining clause restricting Eugene Martin from conveying the property to anyone other than to one of the testatrix's own "blood" is of sufficient clarity and certainty to reduce the original devise to a life estate. It is clear that the original estate created by the will in Eugene Martin was a fee to a one-fourth interest in Redwood Plantation. Manifestly the testatrix recognized in her son, Eugene, qualities of improvidence and made the provision against alienation to anyone other than one of her own blood in order to safeguard the property against such improvidence. There is nothing in the language used, however, to indicate an intention on her part to reduce the original estate granted to him. This is made more apparent by her failure to provide a reversion or limitation over. Eugene made no conveyance in his lifetime to anyone, and the original estate created for him remained unaffected. In the case of Disman v. Flippin's Adm., (Ky.) 116 S.W. 740, the Court dealt with a devise of land to the testator's daughter wherein he devised the land to "her and her heirs forever without the right to her or her husband ever to sell or transfer the same, yet should she leave heirs they may sell and dispose of it as other lands." The Court held that the granting words gave an absolute estate which was not cut down by the subsequent words, and hence the daughter took a fee simple estate whether the attempted restraint on the power of alienation was valid or not.

In the case of Hacker v. Hacker, 153 App. Div. Rep., Supreme Court New York, 153, the testator devised and bequeathed his estate to Joseph Carl Hacker, providing "that the said estate shall not be given or sold only in the name of the Hacker family and must remain the Hacker estate forever." The Court held that the restraint on alienation was ineffectual to limit the quality of the estate given. The Court said: "When an estate is given in one part of a will in clear and decisive terms, it cannot be taken away or cut down by any subsequent words that are not as clear and decisive as the words creating the estate."

We have likewise held in the case of In Re Vail's Will, supra, that an absolute devise may not be reduced to a life estate by any succeeding language which is inferior in clarity and certainty to the devising clause. The testatrix devised to her son Eugene in fee a one-fourth interest in Redwood Plantation by the instrument dated March 24, 1933. She reaffirmed this devise in the instrument dated May 4, 1942. We do not think that the language subsequently used by the testatrix and attempting to partially restrain alienation is of sufficient clarity and certainty to take away or cut down the original estate created.

We are accordingly of the opinion that Eugene Martin was vested at the time of his death with the fee simple title to a one-fourth interest in Redwood Plantation and that his wife succeeded to that interest upon his death.

The appellant, J. Gailliard Martin, in his capacity as testamentary trustee, seeks by his petition a construction and interpretation of the decedent's will to determine his rights, powers and authority with respect to repairs and improvements to the trust property and the sale of such property. The trust estate created by the will is a life estate for the benefit of Mrs. Eslick during her life and

upon her death for the benefit of Frederick Martin Eslick during his life. There is no provision in the will expressly vesting in the trustees authority to make repairs or improvements or to sell the property of the trust estate. The general rule is that the life tenant is obligated to make ordinary repairs necessary to preserve the property, and is also obligated to pay the taxes on the property. 31 C.J.S., Estates, Sec. 44, p. 55; Magee v. Holmes, 220 Miss. 49, 70 So. 2d 60; McDonald v. Arnold, 222 Miss. 80, 75 So. 2d 276. We, therefore, hold that the trustee is authorized to make ordinary repairs to the trust property and to pay therefor, and to pay the taxes, from the rents, revenues and income derived from the property. We pretermit any decision with reference to the authority of the trustee to sell the trust property and with reference to the approval of expenditures of the corpus made or to be made for permanent improvements, until such time as the question may properly come before us to review a decision of the court rendered in the exercise of its equity jurisdiction authorizing or declining to authorize expenditures for permanent improvements or a sale of trust property under the particular facts presented.

The decree of the court below is accordingly modified to conform to this opinion and is affirmed as so modified.

The costs of this appeal are assessed in the proportion of one-half thereof to the appellants and one-half thereof to the appellee.

Affirmed as Modified.

Roberds, P.J., and Hall, Lee and Kyle, JJ. Concur.

STATE OF MISSISSIPPI
HINDS COUNTY

I, Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the opinion delivered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 10th day of October A. D., 1959.

/s/ Tom Q. Ellis

(Seal) Clerk Supreme Court.

APPENDIX "K".

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,201

J. Gailliard Martin, Executor, et al.,

v.

Anna F.B. Martin Eslick et al.

Holmes, Justice:

On Motion to Correct Judgment.

The opinion in this case was handed down on November 12, 1956, and judgment was entered in the cause as of the same date. One of the appellants, Mrs. Mabel W. Martin, now moves the Court to correct the judgment and eliminate therefrom the following:

"It is further ordered, adjudged and decreed that all mineral leases including leases for oil and gas executed by the Trustees J. Gailljard Martin and Francis C. Martin, or either of them, covering or embracing the aforesaid lands in Adams County and elsewhere be and the same are hereby adjudicated to be valid leases and to be in full force and effect from the date thereof."

It is the contention of the movant that the question of the validity of oil and gas leases executed by the testamentary trustees was not presented to or passed upon by the Court, and that it was error to incorporate in the judgment an adjudication of such question. We think the contention of the movant is well taken.

The Court's decision involved a construction of the will of the decedent and the determination of the question as to the right of Mrs. Eslick during her life time to be paid the royalties derived from an oil lease executed subsequent to the death of the testatrix. Except to the extent that such decision might affect the validity of any oil and gas lease executed by the testamentary trustees, the question of the validity of oil and gas leases was not passed upon or decided by the Court. It was erroneous, therefore, to incorporate in the judgment a general adjudication of the validity of oil and gas leases. The motion of the appellant, Mrs. Mabel W. Martin, to correct the judgment by striking and eliminating therefrom such adjudication is sustained. Shipman v. Lovelace, et al, 215 Miss. 141, 60 So. 2d 559.

Motion to Correct Judgment Sustained.

Roberds, P.J., and Hall, Lee and Kyle, JJ. Concur.

STATE OF MISSISSIPPI
HINDS COUNTY

I, Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the opinion delivered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 10th day of October A. D., 1959.

/s/ Tom Q. Ellis

(Seal) Clerk Supreme Court.